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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

Nos. 439-440

UNIVERSAL OIL PRODUCTS COMPANY,
Petitioner,

v.

ROOT REFINING COMPANY,
Defendant,

and

WILLIAM WHITMAN COMPANY, INC.,
Intervenor-Respondent.

REPLY BRIEF OF PETITIONER, UNIVERSAL OIL PRODUCTS COMPANY (IN ANSWER TO OPPOSING BRIEFS OF UNITED STATES, AS *AMICUS CURIAE*, AND WILLIAM WHITMAN COMPANY, INC.)

RALPH S. HARRIS,
Attorney for Petitioner.

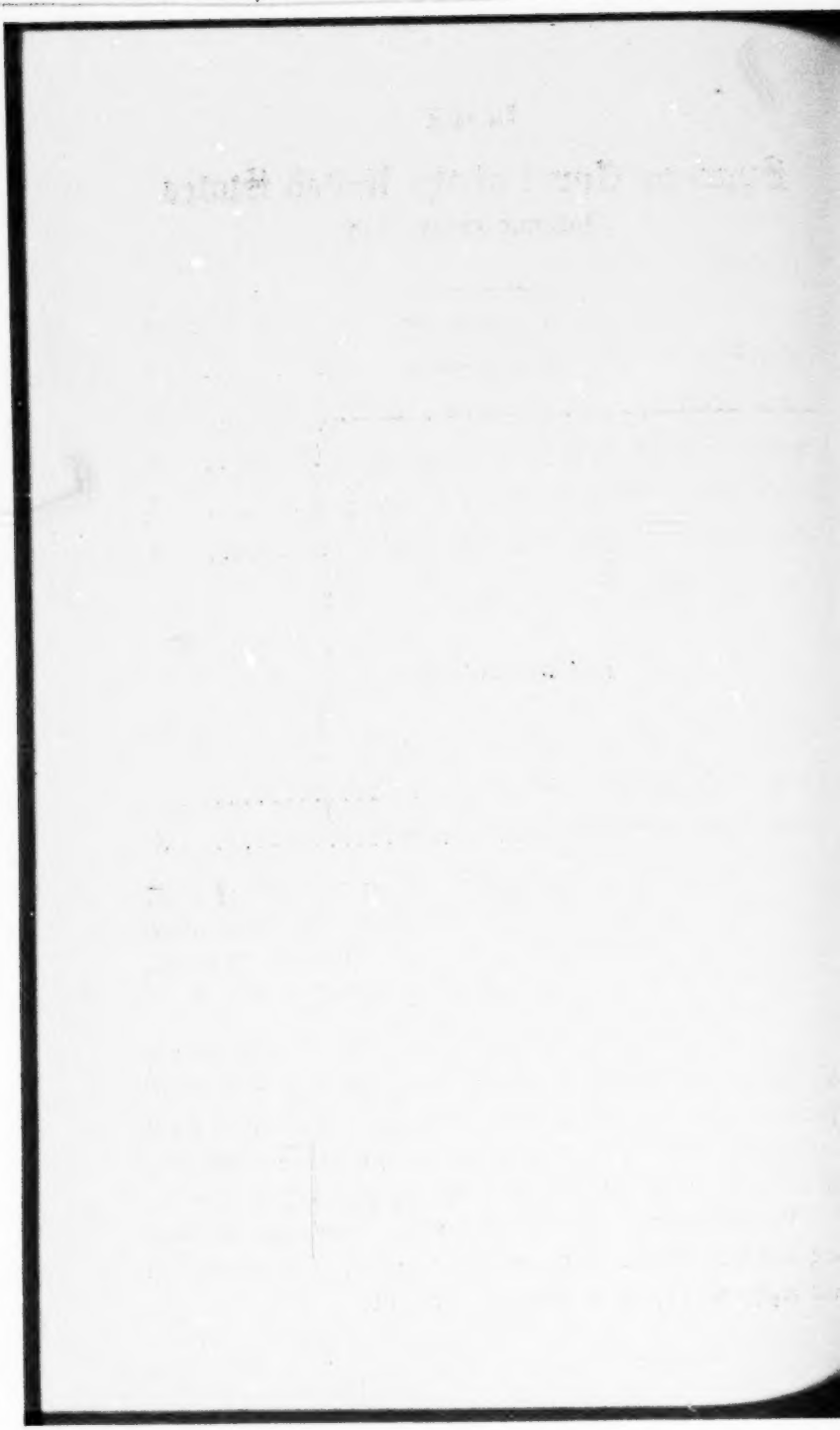
JOHN R. MCCULLOUGH,
ADAM M. BYRD,
LEO L. LASKOFF,
H. ALLEN LOCHNER,
Of Counsel.

CASES CITED

	PAGE
Abernathy, Ex Parte, 320 U. S. 219	4
Atlantic Coast Line R. Co. v. *Powe,* 283 U. S. 401	4
Hamilton Shoe Co. v. *Wolf Brothers,* 240 U. S. 251	4
House v. *Mayo,* 324 U. S. 42	4
United States v. *Carver,* 260 U. S. 482	4

STATUTES CITED

Judicial Code, Section 240(a)	3
Judicial Code, Section 262	3



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The briefs of *Amicus Curiae* and William Whitman Company, Inc. in opposition to the petition and brief of petitioner require some answer, although a reading of them sufficiently discloses that they fail adequately and sincerely to come to grips with the matters advanced by petitioner.

The answering briefs contain inaccuracies and misleading nuances which, but for the necessity for brevity in our reply, we should be anxious to refute.

Aside from these inaccuracies (none of which we deem of sufficient importance to reply to but all of which seem designed to create a hostile atmosphere), the briefs in opposition play and re-play *ad nauseam* two melancholy airs.

The first of these is that petitioner is now for the eighth time raising the constitutional question of whether or not there was a "case" or "controversy" in the court below.

Whitman (Br. p. 29) concludes its oft-repeated flagellation of petitioner as follows:

> "Universal's resort to repeated petitions for writs of *certiorari,* repeated applications to file petitions in mandamus, and again in prohibition, has degenerated into mere legal showmanship and the time has come when this Court can put a period to this surfeit of legal expedients."

If petitioner had refused as obstinately as depicted by Whitman and *Amicus* to bow to the mandates of this Court, then indeed it would have merited the scolding to which it has been subjected in the opposition briefs. But smartly worded phrases are all too often glittering examples that the wish is father to the thought; as is usually the case, the prejudicial effect of such generalities can quickly be scotched by the recitation of the facts.

It is true that petitioner raised these constitutional questions before the master and the Court of Appeals for the Third Circuit. They were not referred to in the report of the master although his denial of a proposed conclusion of law upon that subject indicated that he had passed upon that issue adversely to petitioner. In passing upon the master's report, the Court of Appeals wrote no opinion but adopted his report, findings and conclusions.

When petitioner applied to this Court early in 1945 for writs of prohibition and/or mandamus, these questions were raised. The remedy of prohibition and mandamus, though drastic, was invoked by petitioner as a precautionary measure. This Court in denying those writs specifically stated that its determination was "without prejudice" to petitioner's right to apply for writs of *certiorari*. Petitioner, being in doubt as to whether the Court intended the petitions for writs of *certiorari* to be sought under section 262 or section 240(a) of the old Judicial Code (both being competent to raise the question of jurisdiction of the court below), asked this Court, by way of a motion for a rehearing of the petitions for writs of prohibition and mandamus, for a clarification of its language. This petition was denied. Petitioner thereupon applied for writs of *certiorari* under both section 262 and section 240(a). Both writs were granted. In both proceedings the question of whether or not there was a "case" or "controversy" before the court below was specifically raised. On the arguments and in the briefs before the Court that question was pressed by petitioner and vigorously opposed by *Amici Curiae*. (No party was before the court except your petitioner and former *Amici Curiae* who, by special order of this Court, were permitted to submit a brief and participate in the argument.) This Court handed down its opinion, which is reported in 328 U. S. 575, in which it reversed the order of the Court of Appeals sought to be reviewed. The reversal was ordered under the writ of *certiorari* issued pursuant to section 240(a). The writ issued under section 262 was thereupon dismissed by this Court.

Petitioner regarded the opinion of this Court above referred to as a holding not only that petitioner had been deprived of due process by the proceedings theretofore had

below but, at least implicitly, that there was before the court below no "case" or "controversy" in the constitutional sense.

Accordingly, petitioner urged upon the Court of Appeals for the Third Circuit that the entire proceedings should be dismissed. After extended argument, elaborate briefs and an extensive consideration, the Court of Appeals issued orders in which it undid all that had theretofore been done in the proceedings, namely, it set aside its order which had vacated the Root judgments of affirmance for fraud and also set aside its adoption of the report, findings of fact and conclusions of law of the master. Such action was wholly consistent with the claim by petitioner that there existed no "case" or "controversy" before the court. But the order went on and, among other things, required petitioner to show cause at a stated time why the Root judgments should not be set aside for fraud.

In view, however, of the uncertainty as to what the effect of the order of the Court of Appeals was, petitioner filed in the fall of 1947 petitions for writs of prohibition and mandamus seeking a determination by this Court of whether or not any justiciable controversy existed in the court below. Those petitions were all denied by this Court (332 U. S. 813), because, petitioner assumed, they were premature. In any event, the denial of such petitions for writs of prohibition, mandamus or *certiorari* is without legal significance on this petition. *Ex Parte Abernathy,* 320 U. S. 219; *Atlantic Coast Line R. Co.* v. *Powe,* 283 U. S. 401, 403-4; *United States* v. *Carver,* 260 U. S. 482, 490; *Hamilton Shoe Co.* v. *Wolf Brothers,* 240 U. S. 251, 258; *Accord: House* v. *Mayo,* 324 U. S. 42, 47-8.

Before hearings were had upon the order to show cause, the regular members of the Court of Appeals were relieved

by a designation by the Chief Justice of the United States of three outside judges to conduct the proceedings in the matter.

The Court of Appeals as thus specially constituted announced that it was prepared to receive all objections including objections to jurisdiction and, accordingly, petitioner urged that there existed no "case" or "controversy" before that court. Petitioner's objections were overruled. Petitioner now seeks a definitive determination of the constitutional question involved and respectfully submits that either its position has been already upheld by this Court, at least implicitly in 328 U. S. 575, or else this Court failed in that decision to pass directly upon the question. In neither case, we respectfully submit, can petitioner properly be criticized, as it has been at such great length in the briefs of *Amicus* and Whitman, for seeking a definitive clarification of this issue.

The other topic upon which Whitman, to some extent, and *Amicus*, to a considerable extent, dwell in their briefs is a so-called discussion of the merits of whether or not petitioner can be held responsible for the alleged bribery of Judge Davis by Kaufman, one of its attorneys.

We suggest that that question is not now properly before the Court. If the petition and a review of the merits is granted, petitioner will vigorously maintain that the record does not sustain the conclusion of the lower court, that the findings of fact are tenuous and inferential, and that they fly in the face of all of the direct testimony.

In any event, the whole argument of *Amicus* is illusory and specious for instead of arguing the facts from the record, it merely summarizes and cites to the lower court's opinion. For the purpose both of this petition and the

argument on the hearing on the merits, if granted, the question is not whether the lower court made certain findings but whether those findings are justified. *Amicus* does not in any respect attempt to support the findings by reference to the record with one exception,—two footnotes on page 23 of the brief of *Amicus*. These references to the evidence are not in and of themselves adequate to support the opinion upon which *Amicus* really relies.

While we see no advantage upon this application in discussing the merits of the findings, both *Amicus* and Whitman may have created a prejudicial atmosphere requiring a short rebuttal.

Every person alive in 1941, when the investigation was started, who might have had any knowledge of the Universal-Kaufman employment was produced and examined; that testimony was before the court in the latest hearing. Each of these witnesses categorically denied every fact essential to the proof of bribery and, on the contrary, gave, we submit, convincing sworn testimony to the effect that there was no bribery. The documentary evidence as a whole, we submit, sustained their oral testimony. Only by means of strained inferences did the court below find, in the face of this direct testimony, that there was a bribe.

The alleged bribe, charged by *Amicus* and Whitman, was incredibly fantastic, an Alice-in-Wonderland scheme.

The bribery plan is claimed to have taken the form of a loan of $10,000 by Universal's counsel, Kaufman, to Judge Davis' cousin upon the concededly ample security of Florida real estate. The loan was actually made to Judge Davis' cousin by means of a payment of $10,000 directly from Kaufman to municipal authorities in Florida to redeem Davis' cousin's orange grove property from a tax lien sale.

Upon receipt of the $10,000, the municipality conveyed the foreclosed real estate to Kaufman as security for his loan, to be repaid by Davis' cousin to Kaufman pursuant to a written agreement between them, in which event Kaufman agreed to reconvey the property to Davis' cousin.

Shortly thereafter Judge Davis himself loaned his cousin $4,000 to permit the cousin to continue in business.

Subsequently and over a period of several years, Davis' cousin made certain relatively small payments to Davis. These payments, it is now claimed, were made by Stokley to Davis on account of the Kaufman loan rather than on account of the loan by Judge Davis, although all parties categorically denied such to be the fact and Davis' records showed that all payments were applied against the $4,000 loan.

The attempt to attribute these payments to the Kaufman loan was accomplished by a metaphysical *tour de force*.

The theory by which this loan from Kaufman to Davis' cousin Stokley was metamorphosed into a bribe of Davis was that ultimately the entire $10,000 was to be repaid by Stokley, not to Kaufman, but to Davis, whereupon it is claimed, no agreement or testimony to that effect having been offered, that Kaufman would reconvey the property to Stokley and cancel his obligation. This, we submit, is incredible. Concededly, Judge Davis was in dire financial straits, hence he would not have been satisfied with any such loose arrangement as this.

In the first place, he would have demanded an effective, though clandestine, bribe. Yet the transaction which *Amicus* and Whitman indict was legally and actually ineffectual and was open, notorious and a matter of public record. Davis freely corresponded with Stokley and others

about the transaction, permitted the use of his secretary to draft the papers and of his law clerk to close the transaction and the whole matter was carried out in an atmosphere of complete candor.

In the second place, since Judge Davis was in dire need of funds, it is inherently incredible that the alleged arrangement was that Judge Davis' cousin would trickle over the years small amounts back to Judge Davis. This conclusion is emphasized when it is recalled that Davis, had Kaufman actually been bribing him in the Universal case, could have demanded and received the bribe in cash directly from Kaufman; that Kaufman, had he been a briber, and Davis would have preferred a hidden, though effectual, payment; that since a cash payment would have been effectual, Davis would have received some immediate substantial benefit, which, in his straitened financial circumstances, was supposed to be the motivation of the bribe.

Amicus, however, contends that the bribe was left to the voluntary cooperation of Davis' cousin and Kaufman; that is, that Davis' cousin would pay the money in dribs and drabs to Davis (although he was legally obligated to make the payments to Kaufman more promptly) and that Kaufman would reconvey the property when the payments to Davis had aggregated $10,000 and interest.

While Stokley, Davis' cousin, may have been a fool, we submit that it is beyond ordinary human experience to assume that he would have thus placed himself in jeopardy of being compelled to make the payments twice. This is so because, according to the theory of *Amicus,* he had no legally enforceable right to compel Kaufman to reconvey the property even though he had made the $10,000 and interest payments to Davis. On the other hand, Davis could have claimed that the first $4,000 was on account of the loan

which he had made to Stokley and that the other payments were gifts or loans or payments of other indebtedness from his cousin to him. By the same token, Kaufman could have claimed that he had received nothing and therefore could have kept the property.

Judge Davis was well aware of the financial condition of his cousin and that the possibility of his ever having $10,000 was problematical. Since the $10,000 went to the Florida municipality, Davis would have had to rely upon his impecunious cousin's ability to earn and repay to him the $10,000, plus the $4,000 which he himself had loaned his cousin, before the full benefit would have accrued to Judge Davis.

This is the bribe which *Amicus* and Whitman urged was made for a favorable decision in a case which they describe as of such vital importance to petitioner.

No; Davis, impecunious as he was, would not have been satisfied with such a trickling bribe and one which he could at no time enforce, nor would his cousin have placed himself in the position where, after paying Davis the full $10,000 and interest, he still could not get back his property.

Contrast this transaction with the alleged bribe of Davis by Fox, occurring, it was claimed, about a year after the Stokley loan. In the Davis-Fox matter cash was used, $15,000 in one case and $12,500 in another. This transaction was carried on secretly; no record was made of it. The cash payment, but for the fact that in one instance large bills were used which could be traced through the Federal Reserve System, was almost impossible of detection. On the other hand, the alleged bribe for which Universal stands here condemned is claimed to have been made in the insecure, ineffectual yet wholly overt manner above described.

These are some of the arguments which we shall expect to make to this Court if the petitions for *certiorari* are granted. We see no reason for further elaboration at this time and merely set forth the foregoing in response to what we regard as an improper introduction of the merits of the case by *Amicus* upon this petition.

Petitioner most earnestly and vigorously denies any guilt or complicity in tampering with justice. Its reputation has been unsullied throughout its years of existence. It is now held as a great public trust for scientific, experimental and research work and it desires, even though its officers and directors and stockholders are wholly different from what they were in 1935, to clear its corporate name from the unjust stigma of the judgment below. It protests not that it was weak, but that it was innocent.

While, as we stated at the outset, numerous other inaccuracies and prejudicail matters occurred, we believe that for the purpose of this application the foregoing response is sufficient.

Respectfully submitted,

RALPH S. HARRIS,
Attorney for Petitioner.

JOHN R. MCCULLOUGH,
ADAM M. BYRD,
LEO L. LASKOFF,
H. ALLEN LOCHNER,
Of Counsel.

January 13, 1949.